In the Supreme Court of the United States.

OCTOBER TERM, 1911.

GEORGE S. LATIMER, APPELLANT,
v.
THE UNITED STATES.
No. 151.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

BRIEF FOR THE UNITED STATES.

The statement of the case in appellant's brief correctly sets out the facts.

Merchandise consisting of scraps of tobacco leaf, resulting from handling the product, was imported into Porto Rico. Duty was assessed at 35 cents a pound under paragraph 215 of the Dingley law (1897):

> All other tobacco, manufactured or unmanufactured, not specially provided for in this act, fifty-five cents per pound.

The importer protested against this action and claims the tobacco to be dutiable under paragraph 463:

> Waste, not specially provided for in this act, ten per centum ad valorem.

The merchandise in question is said in importer's brief to be worth 16 cents a pound. If that be true (I do not find it in the record), then he asks the court to abate the duty on his merchandise from 55 cents a pound to 1.6 cents a pound—a very substantial reduction.

When this protest was called for trial by the Board of General Appraisers, protestant submitted the case "on the record." The record consisted of the protest itself and certain formal papers, together with a letter called the collector's report. In it he advises the general appraisers of the facts in the case and the reasons for his classification. This letter is the only thing in the way of evidence to be found in the record and, omitting formal portions, is as follows:

> Before returning said merchandise, it being understood by this office that the importation was a test one, experts of the Porto Rican American Tobacco Co. were summoned, who stated that the article under discussion was without doubt warehouse or storehouse scrap or sweepings, which is even a lower grade of tobacco than factory or table scrap. They stated, however, that after cleaning it could be utilized to make a cheap grade of stogies or cigarettes, in

accordance with which latter statement, par. 215, "All other tobacco, manufactured or unmanufactured, not specially provided for," seems to cover the case more specifically than par. 463, "waste," not specially provided for.

Upon the statements of this letter, the board affirmed the collector's classification and overruled the protest. This form of decision by the board (Record, p. 6) means, according to the practice of that tribunal, that they not only find the claim made in the protest to be without merit but also that on the merits they find the merchandise to have been properly classified by the collector.

From the Board of General Appraisers the importer appealed to the District Court for Porto Rico; the result was an affirmance of the board, and from that judgment this appeal is prosecuted.

On the case thus presented, two principal points will be argued.

First, in the case of *Seeberger* v. *Castro* the classification of this sort of merchandise was fixed, and as fixed was adopted into the later tariff acts.

Second, the merchandise is not the "waste" of the tariff law.

I.

The imported merchandise is still tobacco and nothing but tobacco.

This statement is taken from the opinion of the court below. It is the court's finding of fact, and as such will not be disturbed on appeal. Only

when it ceases to be a finding of fact for want of sufficient evidence to support it does it present a question of law which this court will correct.

Beyer v. *Le Fevre* (186 U. S., 114, at p. 119).

All the evidence there is in this record supports the finding made: The collector says (R., p. 5) that this merchandise is tobacco which is used for making stogies and cigarettes.

The court below does not "practically admit" (I quote from appellant's brief) that this merchandise is waste; on the contrary, finding is expressly made that it is still tobacco; a finding which, as has been pointed out, follows the evidence completely.

In *Seeberger* v. *Castro* (153 U. S., 32) merchandise of like character was under consideration, and this court held it to be dutiable as "tobacco, unmanufactured."

In this statement issue is taken with the argument made in appellant's brief to show that the Seeberger case did not pass on the merits of the controversy now before the court. That was a case in which tobacco remnants fit only to be made into cigarettes and smoking tobacco was assessed as "tobacco, manufactured." It was claimed to be "tobacco, unmanufactured." Although no claim was there made for "waste not specially provided for," still the court did examine the merits of the case in connection with the internal-revenue laws affecting tobacco of like character, and was of opin-

ion (pp. 37, 38) that to define this merchandise as manufactured tobacco would render absolutely useless the internal-revenue laws on the subject of "scraps, cuttings, and clippings of tobacco." Manifestly there existed then, no less than to-day, the same objection to defining the merchandise as "waste"; if the reasons there assigned were persuasive in favor of classification as tobacco unmanufactured, they are equally persuasive to-day against classifying it as "waste."

It is therefore almost demonstrable that the decision in the Seeberger case would have been the same, even if the claim for "waste" had been there made. That being so, the case at bar is controlled thereby.

We may go further: Since the time when it was held in the Seeberger case that merchandise like that in the case at bar was dutiable as unmanufactured tobacco Congress has (including the Dingley law) enacted three tariff acts, and in each one the paragraph on "*waste*" has been identical with the similar paragraph of the 1883 act, under which that decision was made. And in each of those acts the provision for all other unmanufactured tobacco occurring in the 1883 act has been reenacted without material change:

1883.

Par. 251. Tobacco, unmanufactured, not specially enumerated or provided for in this act, thirty per centum ad valorem.

1890.

Par. 243. All other tobacco in leaf, unmanufactured, * * * if stemmed, fifty cents per pound.

1894.

Par. 186. Tobacco, manufactured or unmanufactured, of all descriptions, not specially enumerated or provided for in this act, forty cents per pound.

1897.

Par. 215. All other tobacco, manufactured or unmanufactured, not specially provided for in this act, fifty-five cents per pound.

Reenactment of language which has been construed to include a given article is one of the strongest indications of the congressional intent to continue the existing status as to taxation.

In *U. S.* v. *Freeman* (44 U. S., 556) the following language is used (pp. 564–5):

> If a thing contained in a subsequent statute be within the reason of a former statute, it shall be taken to be within the meaning of that statute; and if it can be gathered from a subsequent statute in *pari materia* what meaning the legislature attached to the words of a former statute, they [*sic*] will amount to a legislative declaration of its meaning and will govern the construction of the first statute.

In the present situation the court has declared what the legislative intent was in the case of the earlier statute; whence it follows that such "decla-

ration of its meaning" will "govern the construction" of the act now under consideration.

The Abbotsford (98 U. S., 440) follows the same rule.

The Customs Court of Appeals has adopted this rule in *Kupfer* v. *U. S.*, decided November 22, 1911, and reported as T. D. 32041. Therein the court gives effect to the "well-established rule" that reenactment in substantially the same language of a statute which has been given a long-continued administrative construction presumes an adoption of the interpretation thus given. It follows, of course, that a decision by this court of a customs question, as in the Seeberger case, gives rise at once to an administrative construction in harmony with such decision.

II.

The tobacco in question is not "waste," as that term is used in the tariff laws.

The provisions for "waste not specially provided for" have been identical in all the acts from that of 1883 down to the present.

It has always been held that the waste referred to in the tariff laws is not "absolutely worthless, but that it is unmerchantable and used for purposes for which merchantable material of the same class is unsuitable."

Patton v. *U. S.* (159 U. S., 500, at p. 503).

The merchandise now under consideration is used for some of the same purposes as merchant-

able tobacco is used; it is destined to be smoked, just as the highest grade of Havana cigars are, and, accordingly, it is not "waste not specially provided for," even if its classification were still uncontrolled by any earlier decision, and legislation confirmatory of it.

Wherefore, the United States prays that this appeal may be dismissed and the decision of the District Court for Porto Rico affirmed.

Respectfully submitted.

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JANUARY, 1912.

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